SUPPORTING BRIEF

Specification of Errors

The petitioner assigns the following errors in the record and proceedings of said cause:

The Court of Criminal Appeals of Texas committed fundamental error in affirming the judgment of the trial court because

1) The ordinance in question is unconstitutional and void on its face because it prohibits and makes illegal that which is inherently lawful, to wit, the business of peddling and selling within the city, in excess of the police power and thereby discriminating against that type of business, contrary to the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

2) The ordinance in question, as its terms are construed by the Texas Courts so as to include distribution of literature in preaching the Gospel, is unconstitutional and void on its face and as so construed and applied, because it expressly prohibits absolutely the exercise of the rights of freedom of the press and freedom to worship Almighty God, contrary to the First and Fourteenth Amendments to the United States Constitution.

3) Article 53 of the Code of Criminal Procedure of Texas, 1925, as construed and applied by the Court of Criminal Appeals of Texas, unduly denies petitioner of his right to the inalienable and inherent writ of habeas corpus, in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

The points presented under the above specifications are related and will be argued together.

It is to be noticed that this ordinance prohibits absolutely and makes unlawful peddling any kind of merchandise on the public square or on any street within the corporate limits of the city of Floresville. (R) This prohibition is unconstitutional, even when applied to peddling of ordinary articles of merchandise. See case of *Jay Burns Baking Co.* v. *Bryan,* 264 U. S. 504, and other cases cited, pages 18-19, infra, this brief.

The Texas courts have construed this ordinance so as to include the distribution of literature containing information and opinion. As so construed it expressly makes unlawful and thereby prohibits the distribution of literature containing information and opinion within the corporate limits of Floresville. This ordinance, therefore, as so construed, on its face is unconstitutional and violative of the First and Fourteenth Amendments to the United States Constitution and is identical with the ordinances knocked down by this Court in Numbers 13, 18 and 29, October Term 1939, in the case of *Schneider* v. *State,* 308 U. S. 147.

The questions presented on this application concern the invalidity of this law expressly, directly and properly presented to the Court of Criminal Appeals in the time and in the manner acceptable to the procedure of Texas.[6]

Furthermore the constitutionality of this ordinance was adequately and sufficiently presented to the County Court and to the Court of Criminal Appeals in the application for writ of habeas corpus. (R. 4, 10-12, 15, 16) See *People of New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 66-69, 71.

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[6] *City of Amarillo* v. *Tutor,* 267 S. W. 697, 199 S. W. 352; *Hoffman* v. *State,* 20 S. W. 2d 1057; *Burnes* v. *State,* 75 Tex. Cr. Rep. 188, 170 S. W. 550, *Gohlman,* etc. v. *Whittle,* 273 S. W. 808. Texas Jur., Vol. 9, page 469.

Attention is called to the fact that under the procedure of Texas it is unnecessary to attack by express allegations the validity of a law in the application for habeas corpus. (See cases footnote 2, supra.) The allegation that one is illegally restrained of his liberty is sufficient to raise any constitutional question, because the constitutionality of a law is a *fundamental question* that can be raised at any time, without allegation of unconstitutionality in petition, oftentimes is considered by the Court of Criminal Appeals even when raised for the first time before that Court.[7] The Court of Criminal Appeals holds that the general allegation of "illegally restrained of liberty" contained in application for writ of habeas corpus authorizes a proceeding inquiring into any ground that would show the restraint to be illegal or the judgment under which the petitioner is held to be void.[8] Furthermore, a constitutional question is considered properly raised when presented at any time, even as late as the motion for rehearing. See cases cited, footnote 6, p. 15, supra.

This matter has been fully discussed in the petition for writ of certiorari filed in *Hilley* v. *Spivey* (companion case filed with this Court), and discussion contained in such petition will not be repeated here but is referred to and made a part hereof as though copied at length herein. The Court is requested to read and consider the same in connection with this question. See pages 11-16, 23-33, *Hilley* petition for writ of certiorari.

The holding of the Court of Criminal Appeals in denying the right to review petitioner's appeal concerning the application for writ of habeas corpus is fictitious and colorless and without foundation and conflicts with the prior decisions of that court in *Ex parte Faulkner,* 158 S. W.

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[7] See footnote 2, p. 5, supra.

[8] See footnote 2, page 5, supra; and *Ex parte Calhoun,* 91 S. W. 2d 1047; *McCormick* v. *Sheppard,* 86 S. W. 2d 213; *Ex parte Cox,* 53 Tex. C. R. 240, 101 S. W. 369; *Ex parte Mato,* 19 T. C. R. 112; *Ex parte Cain,* 56 Tex. C. R. 538, 120 S. W. 999; *Ex parte Walsh,* 59 Tex. C. R. 409, 129 S. W. 118.

2d 525; *Ex parte J. D. Carter* (one of Jehovah's witnesses in one of the companion cases argued with this case when this matter was submitted to the Court of Criminal Appeals), 156 S. W. 2d 986.[9]

In this, as well as companion cases of *Ex parte Largent* and *Ex parte Hilley* in the Court of Criminal Appeals (also brought to this Court as companion cases on petitions for writs of certiorari) it is significant that the Court of Criminal Appeals did not dismiss the appeal for want of jurisdiction, as it would have done under the prevailing practice, had that court seriously believed that it did not have jurisdiction. If an appellate court does not have jurisdiction, as contended by the Court of Criminal Appeals, it would be obligated to sustain the motion to dismiss the appeal made by the State's Attorney in these cases. On the contrary, that court ignored the motion to dismiss made by the State's Attorney and affirmed the judgments of the trial courts in the three cases, remanding the petitioners to custody, thereby showing that the Court of Criminal Appeals considered the cases on the merits and that the *so-called* non-federal question is absolutely colorless and fictitious. The trial courts decided the cases on the merits and held the ordinances constitutional and found petitioners had not been denied their constitutional rights. The Court of Criminal Appeals affirmed the holding of the trial courts, thereby it cannot be said that the disposition made of these three cases is based on an adequate non-federal question.

The Court of Criminal Appeals admittedly holds that it has the power to review the order appealed from if the ordinance is unconstitutional on its face. This necessarily intermingles the *so-called* non-federal question with the federal question so as to require consideration by this Court. Regardless of how the ordinance was construed by

[9] See also *Ex parte Roquemore*, 131 S. W. 1101, *Ex parte Patterson*, 42 Tex. C. R. 256, 58 S. W. 1011; *Ex parte Lewis*, 45 Tex. C. R. 1, 73 S. W. 811; *Ex parte Lewis*, 147 S. W. 2d 478; *Ex parte Baker*, 78 S. W. 2d 610; *Ex parte Spelce*, 119 S. W. 2d 1033, 1037; *Ex parte Slawson*, 141 S. W. 2d 609, 610, and *Ex parte Jones*, 81 S. W. 2d 706.

the court below, it is nevertheless unconstitutional on its face and by its express terms, because it prohibits the innocent and legal business of peddling or selling from house to house or upon the streets. The holding here conflicts with *Ex parte Faulkner,* 158 S. W. 2d 525. This type of law is beyond the police power. This ordinance does not attempt to regulate the business of peddling or selling from house to house, but is an outright prohibition thereof, and such is therefore illegal and unconstitutional and in direct violation of the due process and equal protection clauses of the Fourteenth Amendment.

In *Jay Burns Baking Co.* v. *Bryan,* 264 U. S. 504, this Court held invalid a Nebraska statute which involved an unreasonable restriction through the bread weight law, and said:

> "A state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

Peddling and selling from house to house can never be held as a public nuisance and therefore cannot be prohibited as a crime. 3 *McQuillen on Municipal Corporations,* 2d ed., p. 122.[10] *Ex parte Faulkner,* supra.

[10] See also *Ex parte Baker,* supra; *Ex parte Patterson,* supra; *Orangeburg* v. *Farmer,* 181 S. C. 143, 186 S. E. 785; *Prior* v. *White,* 180 S. 347, 116 A. L. R. 1176; *Ex parte Harris,* 97 Tex. C. R. 399, 261 S. W. 1050; *Real Silk Hosiery Mills* v. *Richmond* (Calif.), 298 F. 126; *Jewel Tea Co.* v. *Town of Bel Air,* 172 Md. 536, 192 A. 417; *White* v. *Town of Culpeper,* 172 Va. 630, 1 S. E. 2d 269; *Jewel Tea Co.* v. *City of Geneva* (Nebr.), 291 N. W. 644; *De Berry* (one of Jehovah's witnesses) v. *City of LaGrange* (Ga.), 8 S. E. 2d 147; *Ex parte Maynard,* 275 S. W. 1071; *City of Columbia* v. *Alexander,* 119 S. E. 241, 32 A. L. R. 746; *City of McAlester* v. *Grand Union Tea Co.,* 98 P. 2d 924; *Commonwealth of Pennsylvania* v. *Myers* (one of Jehovah's witnesses), Opinion by Centre County Court of Quarter Sessions, Jan. 24, 1940; *Chisholm* v. *Shook* (one of Jehovah's witnesses), Opinion by Minnesota 11th Judicial Dist. Court, St. Louis County, Jan. 27, 1940; *New Jersey Good Humor, Inc.* v. *Board of Comm.* 11 A. 2d 113, 114; *George* v. *City of San Francisco,* 235 F. 757, 779; *Humes* v. *City of Little Rock,* 138 F. 929; *Yates* v. *Milwaukee,* 10 Wall. 497; *Yee Gee* v. *City and Co. of San Francisco,* 235 F. 757; *Shreveport* v. *Teague,* 8 S. 2d 640.

Because the matter is *exactly in point,* we here call attention to the case of *Ex parte Walrod,* 120 P. 2d 783, an original habeas corpus action—decided by the Criminal Court of Appeals of Oklahoma Dec. 23, 1941, where that court had before it for review the case of one of Jehovah's witnesses who had been unlawfully imprisoned and restrained of his liberty in the city jail of Stillwater, Oklahoma, for the alleged violation of Ordinance No. 611 of that city, holding unlawful the distribution of literature "on the streets and sidewalks of the congested business district of the City of Stillwater, Oklahoma, and said congested business district is defined as being the territory included from Fifth avenue to Eleventh avenue and between Hudson Street and Lewis Street." There the Criminal Court of Appeals, in discharging petitioner, held the ordinance to be unconstitutional and void under the First and Fourteenth Amendments to the Constitution of the United States because such ordinance denied the rights of freedom of the press, speech and worship, being a prohibition of and direct burden on such rights.

See also *Ex parte Winnett et al.,* 121 P. 2d 312, also an original habeas corpus action decided by the Criminal Court of Appeals of Oklahoma on January 7, 1942, where four of Jehovah's witnesses were restrained of their liberty in the city jail of Shawnee, Oklahoma, for the alleged violation of an ordinance of that city prohibiting the distribution of literature of any kind at any time on the streets of the city of Shawnee. Here the Criminal Court of Appeals likewise rightly found such ordinance unconstitutional and void, being an outright denial of freedom of speech, press and worship guaranteed by the Constitution of the United States and discharged petitioners.

This type of ordinance is admittedly in excess of the police power expressly and is condemned in *Schneider* v. *State,* supra. Even the majority opinion in *Jones* v. *City of Opelika,* Nos. 280, 314 and 966, October Term 1941, 62 S. Ct. 1231, written by Mr. Justice Reed, states that this sort of law is invalid: "Ordinances absolutely prohibit-

ing the exercise of this right to disseminate information are, a fortiori, invalid." See also *Hague* v. *C.I.O.*, 370 U. S. 496, 501, 518.

What is here done by the Court of Criminal Appeals and the County Court of Wilson County in construing the terms of this ordinance to be valid and to include the distribution of literature containing information and opinion has for its basis the same reasoning that was employed by this Court in the majority opinion in *Jones* v. *City of Opelika*, supra. The courts below in this case hold that one who "sells" literature can be dubbed and falsely labeled as a "peddler" or "salesman" of "merchandise" and thereby be denied his constitutional rights. The courts below admit that an ordinance is invalid on its face when expressly prohibiting the distribution of literature but when an ordinance prohibiting peddling is wrongly construed and applied to one engaged in distributing literature it is valid.* *This is a distinction, without a difference.* The ordinance here on its face and as its terms are construed by the courts below expressly prohibits absolutely the exercise of fundamental personal rights within the jurisdiction of the city of Floresville.

If the Court finds that this ordinance is unconstitutional on its face and as its terms have been construed, then, a fortiori, according to the admission of the Court of Criminal Appeals, that Court should have considered the application for writ of habeas corpus.

If the holding of the Court of Criminal Appeals be sustained, then an increased burden of appeals to this Court is necessary in cases involving Jehovah's witnesses from the 254 counties of Texas, because of the action of the Court of Criminal Appeals in attempting to escape and avoid its responsibility under the Constitutions of Texas and the United States, to protect rights secured by the United States Constitution to its citizens in Texas.

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* The non-federal question involved in these three cases is best discussed in the *Hilley* case.

The ordinance is clearly invalid on its face, and for this reason the judgment of the Court of Criminal Appeals should be reversed.

If the argument presented herein (together with that presented in the companion cases of *Hilley* v. *Spivey* and *Largent* v. *Reeves*) is given thoughtful consideration by the Court, the conclusion will be inescapable that this Court has jurisdiction and that the petition for certiorari should be granted and the judgment and decision of the Court of Criminal Appeals should be set aside and held for nought.

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers under 240 (a) of the Judicial Code, 28 U. S. C. A. 347 (a) and Rule 38, par. 5, of this Court. To that end this petition for writ of certiorari should be granted so as to correct the errors complained of committed by, and the judgments rendered by, the Court of Criminal Appeals and the trial courts, against petitioner.

Respectfully submitted,

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